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SUPREME COURT OF THE UNITED STATES.
FILED
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CHARLES ELMORE

OCTOBER TERM, 1934.

No. 519.

WILLIAM A. S. DOUGLAS AND THE AMERICAN MERCURY, INC., PETITIONERS,

v.

ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

BRIEF FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI.

The single question presented by this record is whether the Circuit Court of Appeals was justified in reducing the damages awarded the plaintiff by the District Court from $5,000 to $250.

The petitioner is bound by his admissions in the District Court (1) that there were no damages shown (Rec. p. 20) and (2) that the infringement was innocent (Rec. p. 18).

It is to be noted that the petitioner did not concede merely that he had no proof of actual damage, but that there was no damage at all shown—not even nominal.

The District Court (Lowell, J.), having stated that on the face of the bill the plaintiffs could not "possibly show any damage" (Rec. p. 17), at the close of the evidence made the statement that appears on page 21 of the record and directed the clerk to make an entry of $5,000 damage "to be suspended on the question of law to be argued later" (Rec. p. 20). The judge died before such argument could be made. The case then was submitted on the record to Judge Brewster. It appears from his "memorandum" (Rec. p. 15):

> "Clearly, I cannot pass judgment upon the justice of an award by another judge of this Court" and "any party aggrieved by Judge Lowell's action has his remedy by appeal."

It is evident, therefore, that there never has been in the District Court an exercise of considered discretion.

However that may be, the question presented to the Court of Appeals was whether on the record in the case the award was "just" or, to use the language of this Court, met the "sense of justice" of the judge; 249 U. S. at p. 107. By the rule as laid down by this Court the award is to be based on:

> "the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like."
>
> *Westermann Co.* v. *Dispatch Co.*, 249 U. S. at p. 106.

A Circuit Court of Appeals had earlier affirmed the same doctrine where it said:

> "The duty of the Court was to award damages as justified by the nature and circumstances of the case as developed upon trial. Thus while the discretion of the Court may be used to award damages where ***no proof of actual damage is offered***, yet the award should have relation to such inferences as are reasonably deductible from the whole case of infringement; and such damages are not to be awarded as based upon the idea of punishment."

Turner, etc., v. *Crowley*, 252 Fed. 749 at 754, where the Court materially reduced the damages awarded in the District Court.

The plaintiff's evidence (Rec. p. 18) merely raised what one judge has termed "a trivial pother—a mere point of honor".

> *Fisher* v. *Dillingham*, 298 Fed. Rep. at page 145, per L. Hand, J.,

or a "tempest in a teapot".

Warren v. *White & Wycoff Mfg. Co.*, 39 Fed. Rep. (2d) 922, or a "very trifling advantage" to the defendant.

Insurance Press v. *Ford Motor Car Co.*, 255 Fed. Rep. 896, per A. N. Hand, J.

Previous to the decisions of this Court relative to the minimum to be awarded, various District Judges had rebelled against awarding the minimum damages where slight damage had been suffered.

Woodman-Lydiard v. *Peterson Co.*, 192 Fed. Rep. 67.
Mills v. *Standard Music Co.*, 223 Fed. Rep. 849.
Decker v. *Etchison Hat Co.*, 225 Fed. Rep. 135.

Should the case eventually come before this Court for decision, the question whether the award in the decree was "just" is necessarily involved.

A word as to the previous decisions of this Court.

In the Westermann case the record showed that the plaintiff *had* suffered real damage (249 U. S. p. 103) and so is differentiated from the present case.

In the Jewell-LaSalle case the opinion does not show whether there was damage or not, as the questions certified by the Circuit Court of Appeals merely stated that there was "no *proof* of actual damage"; quite a different thing from presenting the circumstances of the case to the Court for its opinion.

In the certificate by the Appellate Court, however, it appears that the

> "renditions and performances were public and were made available to the public and were for the purposes of profit both for said defendants and for others using the station"

and "There was no *proof* of actual damage". See certificate of the Appellate Court, pages 4, 6 and 8 in the printed record.

The argument of the petitioner that the finding of the Court is conclusive evidence that it regarded the finding as "just", inasmuch as the allowance of a dollar a copy is contained in subsection b second of Section 25, is answered by the argument of Wilson, J. (Rec. pp. 36, 37) better than it can be restated by counsel.

We submit that the application for the writ should be denied

Respectfully submitted,

EDMUND A. WHITMAN,
of Counsel for Respondents.